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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 758

ANTOINE BONTZ,
Appellant,

vs.

STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

JURISDICTIONAL STATEMENT

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INDEX

JURISDICTIONAL STATEMENT

Introductory Statement 1
Opinions Below 2
Jurisdiction 2
Question Presented 3
Statutes Involved 3
Statement of the Cases 4
The Question Is Substantial 6
1. The true effect of the Kansas worthless check act is to impose imprisonment for debt 8
2. The Kansas worthless check act is enforced as a debt-collecting law 8
3. The provisions of the Kansas worthless check act are not compatible with its avowed purpose 13
Appendix "A" A1
Opinion, State of Kansas v. Antoine Bontz, Case No. 43,504, Kansas Supreme Court A1
Opinion, State of Kansas v. Antoine Bontz, Case No. 43,505, Kansas Supreme Court A9
Journal Entry on Application to Abate, District Court, Sedgwick County, Kansas A10
Journal Entry on Trial, District Court, Sedgwick County, Kansas A13
Appendix "B" A15
G.S. Kan. 1949, 21-554 ..... A15
G.S. Kan. 1949, 21-556 ..... A15
G.S. Kan. 1949, 21-557 ..... A15
G.S. Kan. 1949, 21-558 ..... A15
G.S. Kan. 1949, 21-559 ..... A16
G.S. Kan., 1961 Supp., 21-555 ..... A16

TABLE OF CITATIONS

CASES:

Charleston Federal Savings & Loan Association v. *Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624 (1945) 3

In re Myers, 119 Kan. 270, 237 Pac. 1026 (1925) 5

James Stewart & Co. v. *Sadrakula*, 309 U.S. 94, 84 L. Ed. 596, 60 S. Ct. 431 (1940) 3

Kesler v. *Department of Public Safety*, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807 (1962) 6, 7

Local Loan Co. v. *Hunt*, 292 U.S. 234, 78 L. Ed. 1230, 54 S. Ct. 695 (1934) 7

Reitz v. *Mealey*, 314 U.S. 33, 86 L. Ed. 21, 62 S. Ct. 24 (1941) 6

State v. *Avery*, 111 Kan. 588, 207 Pac. 838 (1922) 8, 10, 11, 13, 14

State v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601 ..... 5, 8

State v. *Crane*, 136 Kan. 181, 14 P.2d 634 (1932) 8

State v. *Johnson*, 116 Kan. 390, 226 Pac. 758 (1924) 9

State v. *Morris*, 190 Kan. 93, 372 P.2d 282 (1962) 9

State v. *Nelson*, 58 S.D. 562, 237 N.W. 766, 76 A.L.R. 1226, 1229 (1931) 10, 13

United States v. *Fromen*, 265 F.2d 702 (C.A. 2, 1959) 13

Whitney v. *California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641 (1927) 3

Windle v. *Wire*, 179 Kan. 239, 294 P.2d 213 (1956) 8

Statutes and Constitutional Provisions:

Bankruptcy Act, Section 17 (11 U.S.C. 35) 2, 8
Constitution of United States, Article VI, Supremacy Clause 2
G.S. Kan. 1949, 20-203 6
G.S. Kan. 1949, 21-554 ..... 2, 3, 4
G.S. Kan. 1949, 21-556 ..... 3, 4, 5, 8
G.S. Kan. 1949, 21-557 3
G.S. Kan. 1949, 21-558 ..... 3, 9
G.S. Kan. 1949, 21-559 3
G.S. Kan., 1961 Supp., 21-555 ..... 3, 9
Kansas Sessions Laws, 1963, Chapter 219 12
28 U.S.C., § 1257(2) 3

Text Books and Miscellaneous:

76 A.L.R. 1229 8
95 A.L.R. 486 8
29 A.L.R. 2d 1181 8
Callahan, "The Worthless Check Problem", 22 K.B.J. 195 11
Oldfather, "Bills and Notes", Survey of Kansas Law, 5 K.L.R. 153 12

SUPREME COURT OF THE UNITED STATES

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No.

ANTOINE BONTZ,
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STATE OF KANSAS,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

JURISDICTIONAL STATEMENT

Appellant appeals from two judgments of the Supreme Court of the State of Kansas entered in separate cases on November 2, 1963. Each judgment affirmed a conviction by the District Court of Sedgwick County, Kansas, of issuing a worthless check and an order of that court denying appellant's application to abate the criminal prosecution. The identical federal question involved in both cases. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeals and that a substantial question is presented.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Kansas are reported in 192 Kan. 158 and 192 Kan. 133. The Pacific Reporter citations are not available at this time. The opinions of the District Court of Sedgwick County, Kansas, are not reported. Copies of the opinions of the Supreme Court of the State of Kansas, and of the journal entries on application to abate and journal entries on trial of the District Court of Sedgwick County, Kansas, are attached hereto as Appendix "A". As the journal entry on application to abate filed in each case, except for reference to the case number of the other case with which it was consolidated for hearing, and as the journal entry on trial filed in each case were duplicates of the other, only one of each journal entry is included in Appendix "A".

JURISDICTION

These cases are criminal prosecutions which were brought under G.S. Kan. 1949, 21-554, a section of the then Kansas worthless check act, which has now been repealed. The judgments of the Supreme Court of the State of Kansas were entered on November 2, 1963, and notice of appeal was filed in that court in each case on November 16, 1963. In each case the validity of the worthless check act was attacked on the ground that the act, as construed and applied in these cases, is repugnant to Section 17 of the Bankruptcy Act (11 U.S.C. 35) and therefore void under the Supremacy Clause of Article VI of the Constitution of the United States. In each case the validity of the Kansas act was expressly upheld. The jurisdiction of the Supreme Court to review these decisions by direct

appeal rests upon 28 U.S.C., § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments or direct appeal. *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 89 L. Ed. 857, 65 S. Ct. 624 (1945); *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 84 L. Ed. 596, 60 S. Ct. 431 (1940); *Whitney* v. *California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641 (1927).

QUESTION PRESENTED

Where the Kansas worthless check act makes it a crime, irrespective of criminal intent, to issue a check which is dishonored upon presentment, but further provides that the defendant shall have the right to abate the criminal action and obtain his discharge by paying the check and the costs upon showing that he had an account in the bank upon which the check was drawn thirty (30) days next prior to the date the check was delivered and that the check was not issued with intent to defraud, and where the defendant has made the requisite showing of his right so to abate, may the act be construed to require that the check be paid in cash in order to abate the action and avoid the criminal penalty, despite the fact that the check has been discharged in bankruptcy; or is the act as so construed and applied repugnant to the federal Bankruptcy Act and therefore void under the Supremacy Clause of the United States Constitution?

STATUTES INVOLVED

G.S. Kan. 1949, 21-554; G.S. Kan., 1961 Supp., 21-555; and G.S. Kan. 1949, 21-556, 21-557, 21-558 and 21-559, comprising what is commonly known as the Kansas worthless check act, are set forth in Appendix "B" attached hereto.

STATEMENT OF THE CASES

By separate formal complaints of the payees filed in the Court of Common Pleas of Sedgwick County, Kansas, appellant was charged with issuing two worthless checks contrary to G.S. Kan. 1949, 21-554. Both checks were dated May 18, 1961, and were drawn on the East Side State Bank of Wichita, Kansas, by Bontz Construction Company, Inc. and signed on its behalf by the appellant, as its President. Both checks were dishonored upon presentment because of insufficient funds.

Prior to the filing of the one complaint, and before the preliminary hearing in either case, both the appellant and Bontz Construction Company, Inc., filed voluntary petitions in bankruptcy in the United States District Court for the District of Kansas on July 25, 1961, and the checks constituting the basis of the complaints were listed in the scheduled debts in the bankruptcy proceedings. The proceedings on the complaints were thereupon stayed until the final discharges of the appellant and the corporation were entered on February 5, 1962. After preliminary hearings in both cases on April 27, 1962, appellant was bound over to the District Court of Sedgwick County, Kansas, to stand trial, and the informations were filed in that court on May 3, 1962.

Prior to trial appellant filed in each case an application to abate the action and to obtain his discharge pursuant to G.S. Kan. 1949, 21-556. These applications were consolidated for hearing prior to trial on December 17, 1962. On the hearing the District Court made findings of fact and conclusions of law (journal entry on application to abate, Appendix "A"). The court found that Bontz Construction Company, Inc., had an account in the drawee

bank within thirty (30) days prior to the issuance of the checks; that the checks were given without intent to defraud, as they were attempted payments of antecedent debts; and accordingly that appellant had the right to abate the actions and obtain his discharge under G.S. Kan. 1949, 21-556, by paying the checks and the costs of the actions. The court further found that the checks and costs had been discharged in bankruptcy, as it found that prior to July 7, 1962, when the decision in *State of Kansas* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, was rendered, the discharges in bankruptcy of appellant and the corporation would have constituted abatement and appellant would have been discharged. For the status of the Kansas law in this respect prior to the *Breitenbach* case, see *In re Myers*, 119 Kan. 270, 237 Pac. 1026 (1925), which was overruled by the *Breitenbach* case and which held that a discharge in bankruptcy constitutes the requisite payment necessary to abate the action under the Kansas worthless check act. However, because of the *Breitenbach* decision, and because appellant could not pay the checks and costs in cash or other than by the discharges in bankruptcy, the applications to abate and for discharge were denied and the appellant was ordered to stand trial. Upon trial, the appellant was convicted in both cases.

The appellant perfected his appeal in both cases to the Supreme Court of the State of Kansas, the highest court of the State. In both cases one of the questions presented on appeal and ruled upon was, in the phrasing of that court, "If a discharge in bankruptcy of the liability on the check does not constitute an abatement in section 21-556 of the 'worthless check' act, then is the act in conflict with section 17 of the Bankruptcy Act and the Supremacy Clause of the Constitution of the United States" (Opinion, Case No. 43,504, Appendix "A"; 192 Kan. 158, 160). The

court expressly considered and ruled upon the question, the majority of the court, with one justice dissenting and one justice not participating, holding that "the provisions of the mentioned 'worthless check' act are not invalid under the Supremacy Clause of the federal Constitution as conflicting with the Bankruptcy Act . . ." (Opinion, Case No. 43,504, Appendix "A"; 192 Kan. 158, 162). Substantially the same language is contained in Syllabus 4 by the court. Under Kansas law the syllabus contains the points of law decided in any given case. G.S. 1949, 20-203. After deciding the federal question, which was necessary to a determination of the causes, the judgment of the lower court in each case was affirmed.

THE QUESTION IS SUBSTANTIAL

The issue involved in these appeals presents the rather rare problem of how far a state may infringe upon the federal bankruptcy domain in the exercise of its so-called police power. The only cases found in the reports in which the Supreme Court was confronted with this problem are *Reitz* v. *Mealey*, 314 U.S. 33, 86 L. Ed. 21, 62 S. Ct. 24 (1941), and *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807 (1962). Both dealt with a conflict between the Bankruptcy Act and state motor vehicle safety responsibility laws. Both were decided by a sharply divided court, the justices in the *Reitz* case dividing five to four, and in the *Kesler* case five to three.

In the *Kesler* case, which extensively reviewed the decision in *Reitz*, the majority opinion recognized that "states are not free to impose whatever sanctions they wish, other than an action of debt or assumpsit, to enforce collection of a discharged debt" (369 U.S. 170) and that "some inroad is made on the consequences of bankruptcy" (369

U.S. 171) by the state law involved therein. Nevertheless, the majority upheld the state law on the basis that "the 'police power' of a State, especially when exerted for the protection of life and limb, is as pervasive as any of the reserved powers of the States" (369 U.S. 172); that as practically all states and the District of Columbia had adopted substantially the same law, the law apparently was compatible with its avowed purpose; and that therefore "the bearing of the statute on the purposes served by bankruptcy legislation is essentially tangential" (369 U.S. 174). Implicit in the decision, as well as in the *Reitz* case, is the principle that the effect of a state law, insofar as it relates to or is subversive of the Bankruptcy Act, is strictly a federal question and decisions of the Supreme Court rather than the state courts are controlling. This principle is also pointedly illustrated by the landmark case of *Local Loan Co. v. Hunt*, 292 U.S. 234, 78 L. Ed. 1230, 54 S. Ct. 695 (1934).

The Kansas worthless check act presents a direct infringement upon the Bankruptcy Act. The Kansas act is directly concerned with contractual transactions between debtors and creditors as it has for its subject instruments commonly used in those transactions. Whether or not a crime has been committed in those financial transactions is determined without reference to criminal or good-faith intent, tortious conduct, or actual damage, and the act is only incidentally related to its avowed purpose. Its actual effect, despite conclusions to the contrary by the Kansas courts under Kansas law, is imprisonment for debt. The federal Constitution and federal laws may not be concerned with imprisonment for debt as such, but the question in principle raised by these appeals is whether the State can validly enact laws imposing imprisonment for debts discharged in bankruptcy. An analysis of the Kansas worthless check act,

the Kansas decisions construing it, and the manner in which it has been administered verify these conclusions concerning the Kansas law.

1. **The true effect of the Kansas worthless check act is to impose imprisonment for debt.** G.S. Kan. 1949, 21-554, does not expressly include intent to defraud or criminal intent as an element of the crime, and the Kansas Supreme Court has consistently held that the crime is committed irrespective of such intent or moral turpitude. *State* v. *Avery*, 111 Kan. 588, 207 Pac. 838 (1922); *State* v. *Crane*, 136 Kan. 181, 14 P.2d 634 (1932); *Windle* v. *Wire*, 179 Kan. 239, 294 P.2d 213 (1956). In this respect the Kansas act is unusual, if not unique, as most states apparently require such intent in order to uphold the validity of worthless check laws. See the cases from other states annotated in 76 A.L.R. 1229; 95 A.L.R. 486, 488; and 29 A.L.R. 2d 1181. If fraud were an element of the crime, then of course there could be no conflict between the act and Section 17 of the Bankruptcy Act (11 U.S.C. 35), nor would the act impose imprisonment for debt, as the imprisonment would be for the tortious conduct in issuing the check.

Under the Kansas act, intent to defraud becomes material only under the abatement procedure set forth in G.S. Kan. 1949, 21-556. Under that section of the act the defendant in the prosecution, upon making the requisite showing, including the lack of intent to defraud, may abate the action and obtain his discharge by paying the check and the costs of the action. The language of the Kansas Supreme Court in *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601 (1962) and in the opinions in the instant cases notwithstanding, the payment referred to in the abatement section in reality is the payment of the civil obligation evidenced by the check. The payment required to abate is for the check holder in satisfaction of the check, and accordingly the

act has always been construed so that the payment need not necessarily be made through the court and is to be paid only in the amount owing on it at the time of abatement. See *State* v. *Johnson*, 116 Kan. 390, 226 Pac. 758 (1924); and Journal Entry on Application to Abate, Appendix "A", in which the trial court found, without objection on the part of the State, that the amount necessary to abate the prosecution on the James Ray Distributing Company check was its face amount less $750.00 which had previously been paid on it. Upon satisfying such obligation the State is no longer interested, the action is extinguished, and the defendant is free from all taint of criminal guilt. As stated by the Kansas Supreme Court in *State* v. *Morris*, 190 Kan. 93, 97, 372 P.2d 282, 286 (1962), the purpose of the legislature in including the abatement provision in the act was to allow the defendant "to correct his mistake and thus avoid any record of a criminal prosecution".

As the so-called crime does not require criminal or fraudulent intent, and as the abatement provisions permit a defendant to erase any record of a crime by paying the check and costs, it can only be concluded that the penalty imposed by G.S., 1961 Supp., 21-555, is actually imposed for failure to pay the check rather than issuing the check in the first instance. This conclusion is fortified by G.S. Kan. 1949, 21-558, which provides that the act shall not apply to any checks which are "actually honored" by the drawee bank. Although there are no cases on the point, apparently no crime has been committed by dishonor on the first presentment if the check is honored later on a subsequent presentment, as the check has then been "actually honored". In any event, the crime is not complete until the check is dishonored, and no criminal sanctions are imposed if the check is paid either upon presentment or upon abatement.

No cases, other than Kansas cases, have been found in which a check law combining the three features of the Kansas law discussed above was upheld as serving a valid public policy. On the other hand, the Kansas act was adopted by South Dakota after its validity had been upheld in Kansas in *State* v. *Avery*, supra, but, notwithstanding the Kansas decision, the Supreme Court of South Dakota declared it unconstitutional under its state constitution as imposing imprisonment for debt. In *State* v. *Nelson*, 58 S.D. 562, 237 N.W. 766, 768, 76 A.L.R. 1226, 1229 (1931), the court summarized the act and its conclusion as follows:

> ". . . North Dakota has a bad check law, so also have many other states, but so far as we are advised all such laws, except those of North Dakota, South Dakota, and Kansas, make moral turpitude in some form an element of the offense. The North Dakota law makes the issuance of a check against a bank where the maker of the check has not sufficient funds in or credit with such bank to meet the check on presentation a misdemeanor, and the offense is complete as soon as the check is issued. . . . Under the South Dakota and Kansas laws the provisions of sections 1 [G.S. Kan. 1949, 21-554] and 2 [G.S. Kan. 1961 Supp., 21-555] do not apply until the check has been presented for payment and been dishonored, and then, after a prosecution has been instituted, the defendant may pay the check and the costs and thereby abate the action. Under this law the penalty is for failure to pay the check when presented for payment, and for that reason the law is a 'bad debt' or debt collecting law, and violates the provisions of section 15 of article 6 of the Constitution, which prohibits imprisonment for debt founded on contract."

2. **The Kansas worthless check act is enforced as a debt-collecting law.** The Kansas worthless check act under which appellant was convicted was passed as the result of

bankers' and business men's associations (*State* v. *Avery*, 111 Kan. 588, 593, 207 Pac. 838, 841), and ever since that time, until its repeal by the Kansas legislature in 1963, was viewed by the public at large and treated by law-enforcement officers primarily as the debt-collecting law that it was. In approximately 1953 a questionnaire was submitted to all 105 county attorneys in the State asking for statistics concerning prosecution and abatement under the act, to which 46 responded. The results are reviewed in Callahan, "The Worthless Check Problem", 22 K.B.J. 195, excerpts from which are as follows:

> "No particular county or section of the state has a greater check problem than any other. Nearly all counties reporting indicated an overwhelming majority of the worthless checks turned in to the authorities are abated. The estimated number of worthless checks passed in these counties during an average year was 12,400. (It is conceded this figure is undoubtedly too low.) Of these, 35% were felony and 65% misdemeanor. Complaints were signed and warrants issued on approximately 56% of the felony checks and on approximately 48% of the misdemeanor checks. Only about 15% of the felony check cases filed and 12-1/2% of the misdemeanor check cases filed were actually prosecuted. Only about 8% of the estimated felony checks passed during an average year and 6% of the misdemeanor checks are actually prosecuted." (p. 195)

> "The County Attorneys were asked to rate merchant cooperation in dealing with the hot check traffic. Seventeen counties rated merchant cooperation as good to fair, and twenty-eight said merchant cooperation was poor. Most of the County Attorneys reported that nearly all recipients of hot checks in their counties were not interested in actual prosecution—they only wanted their money." (p. 196)

> "It is quite clear that the vast majority of merchants and others who receive worthless checks regard

law enforcement officers and the courts as mere agencies to collect their money. They can't be blamed for wanting their money. Forcing payment by use of criminal processes, however, does not abate the worthless check traffic. . . ." (p. 196)

". . . Law enforcement officers and the courts do not relish the role of 'Public collector of worthless checks'—while closing their eyes to criminal violations. Under the present Act, however, it is either abate or prosecute. And the public demands abatement. Human nature being what it is, the public gets abatement. No doubt, if abatement was abolished, there would be a great hue and cry. But why should this free check collecting continue? Is not the man with an open account or a promissory note just as deserving of free collection service?" (p. 196)

The results of the survey were hardly surprising, but only put in statistical form the common knowledge that the Kansas check law was universally used as a collection device. For example, see Oldfather, "Bills and Notes", Survey of Kansas Law, 5 K.L.R. 153, 157, where he makes the statement:

". . . Even a professor, may, I think, take judicial notice of pressure put on installment debtors to give a check for a past due installment on something they shouldn't have been pressured into buying in the first place, the upshot of which is that the sheriff ends up as a collecting agency with perhaps a five-year prison term as a persuader. . . ."

As a result of the long and painful experience with the worthless check act, the Kansas legislature finally in 1963 repealed the act and passed a true bad-check law, which does not lend itself to being merely a collection device. The new law, among other provisions, requires fraudulent intent. Kansas Session Laws, 1963, Chapter 219.

3. **The provisions of the Kansas worthless check act are not compatible with its avowed purpose.** The purported purpose of the Kansas worthless check act, as stated in *State* v. *Avery*, supra, was "to discourage overdrafts and resulting bad banking, to stop the practice of 'check kiting', and generally to avert the misehief to trade, commerce and banking which the circulation of worthless checks inflicts" (Syl. 1 by the court). This statement of purpose has often been repeated by the Kansas court in check cases, including the instant cases (Opinion, Case No. 43,504, Appendix "A"; 192 Kan. 158). However, the actual provisions of the act are not designed to accomplish the stated purpose and, from a realistic point of view, are only incidentally related, if at all, to that purpose. The Supreme Court of South Dakota in *State* v. *Nelson*, supra, clearly pointed out the discrepancy between the actual provisions and the so-called purpose when it said:

> "We are not able to agree in full with this part of the opinion [*State* v. *Avery*]. In the first place, this law has no application to overdrafts; because unless the check is honored, there can be no overdraft, and, if the check is honored, then no offense was committed by issuing the check. And, if the law was intended to obviate the demoralization of business caused by the circulation of worthless checks, then there would have been no occasion for incorporating sections 3 [G.S. Kan. 1949, 21-556] and 5 [G.S. Kan. 1949, 21-558] into the law." (237 N.W. 768)

The act likewise has only incidental relevance, if any, to "check-kiting", an activity which involves willful fraud in having checks honored. *United States* v. *Fromen*, 265 F.2d 702 (C.A. 2, 1959). Having been honored, a "kited" check cannot form the basis of a prosecution under the Kansas check law. The primary thrust of the act is not to prevent fraud, as fraud is not an element of the offense.

but rather is to prevent non-payment, either upon presentment or upon abatement.

As the provisions of the act are not applicable to the practices which the act is purportedly designed to prevent, and as the penalty is inflicted only in the event of non-payment, the purpose "generally to avert the mischief to trade, commerce and banking" referred to in *State* v. *Avery*, supra, can only refer to the nuisance, in the general sense, created by any failure to pay debts, however evidenced. In this general sense, the Bankruptcy Act itself constitutes a similar nuisance.

It is submitted that the Bankruptcy Act constitutes an important and historical policy of this nation and that the states, in the exercise of their so-called police powers, may not whittle it away by debt-collecting laws. If they may, then the states have the power to repeal the Bankruptcy Act. It is further submitted that the Kansas worthless check act, which was operative at the time these cases arose, was a debt-collecting law only incidentally related to its avowed purpose and that the characterization otherwise by the Kansas Court is in error and, in any event, is not controlling on the Supreme Court in the context of the instant cases. The appellant therefore respectfully submits that the Kansas worthless check act, as construed and applied in these cases, constitutes a direct infringement upon the Bankruptcy Act, and that the question presented by these appeals is substantial.

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APPENDIX "A"

No. 43,504

THE STATE OF KANSAS,
Appellee,

v.

ANTOINE BONTZ,
Appellant.

Syllabus by the Court

1. We adhere to the rules of law as set out in *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, that in construing G.S. 1949, 21-556, a discharge in bankruptcy may not be pleaded by an offender under the "worthless check" statute as payment of the check in a proceeding to abate the criminal action and obtain his discharge.

2. A discharge in bankruptcy relieves the bankrupt from legal liability to pay a debt that was provable and is a valid defense in an action brought in a state court to recover the debt, but it does not free the bankrupt from all traces of the debt as though it had never been incurred.

3. The right of a defendant to abate a criminal action under G.S. 1949, 21-556, is permissive and a privilege given to the offender which he may or may not exercise. If exercised, it must be done in the manner prescribed by statute.

4. The provisions of section 21-556 of the "worthless check" act are not invalid under the Supremacy Clause of the federal Constitution as conflicting with the federal Bankruptcy Act.

Appeal from Sedgwick district court, division No. 2; HOWARD C. KLINE, judge. Opinion filed November 2, 1963. Affirmed.

Ralph R. Brock, of Wichita, argued the cause, and *Lester L. Morris, Verne M. Laing, Ferd E. Evans, Jr., Joseph W. Kennedy* and *C. Robert Bell*, of Wichita, were with him on the briefs for the appellant.

Owen J. Ballinger, deputy county attorney, argued the cause, and *William M. Ferguson*, attorney general, *Keith Sanborn*, county attorney, and *William J. Tomlinson*, deputy county attorney, were with him on the brief for the appellee. The opinion of the court was delivered by

WERTZ, J.: The defendant (appellant) was convicted in the court below of issuing a worthless check in an amount in excess of $50 in violation of G.S. 1949, 21-554, and was sentenced to imprisonment in the Kansas State Penitentiary.

Pursuant to G.S. 1949, 21-554, which provides that it shall be unlawful for any person to draw, make, utter, issue or deliver to another any check on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering or delivery of the check he had no funds on deposit in or credits with such bank with which to pay the draft upon presentation, complaint was filed on July 26, 1961, in the court of common pleas of Sedgwick county charging defendant with giving a worthless check to James Ray Distributing Co., in the amount of $1,232.91, drawn upon the East Side State Bank of Wichita.

Prior to the preliminary hearing defendant filed a voluntary petition in bankruptcy in the United States District Court for the District of Kansas. The insufficient

fund check given by defendant, which constituted the basis of the complaint, was listed as one of defendant's scheduled debts in the bankruptcy proceedings. The proceedings on the worthless check complaint were stayed until defendant's final discharge in bankruptcy on February 5, 1962.

On April 27 a preliminary hearing was had and defendant was bound over to the district court for trial. An information was filed in the latter court charging the defendant with the issuance of the worthless check as hereinbefore related.

Prior to the trial on the information in the district court defendant filed an application to abate the action pursuant to G.S. 1949, 21-556, which provides, in substance, that in any case where a prosecution is begun under the provisions of the "worthless check" act, the defendant shall have the right, upon application made before trial, to have the action abated by showing to the court that he had an account in the bank upon which the check or draft was drawn thirty days next prior to the time the check was delivered, and that the check was not drawn upon the bank with the intent to defraud the party receiving it, and if the court shall so find, the action shall be abated and the defendant discharged *upon paying into court the amount of such check and the costs in said case.*

At the hearing on his application to abate defendant introduced a certified copy of his discharge in bankruptcy entered on February 5, 1962, and other evidence. The trial court found that at the time the check was given defendant had an account in the bank on which the check was drawn within thirty days next prior to giving the check and that defendant did not have the intent to defraud the payee at the time the check was issued. The court also found the defendant was not in a position to abate the

check by paying the amount of the check and costs, and further found that under the authority of *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, defendant's discharge in bankruptcy was not grounds for abatement of the action and overruled defendant's motion to abate.

Subsequent thereto defendant waived his right to trial by jury and the case was tried to the court. The court found the defendant guilty and under the provisions of G.S. 1949, 21-555, sentenced him for the offense charged in the information. From an order overruling defendant's motion for new trial and his plea in abatement defendant has appealed.

The two questions presented on this appeal are (1) whether a discharge in bankruptcy may be pleaded by an offender under the "worthless check" statute (21-554) as payment of the check in a proceeding authorized by section 21-556 and thereby secure an abatement of a criminal action and obtain his discharge, and (2) if a discharge in bankruptcy of the liability on the check does not constitute an abatement under section 21-556 of the "worthless check" act, then is the act in conflict with section 17 of the Bankruptcy Act and the Supremacy Clause of the Constitution of the United States.

The defendant is fully aware of our recent case of *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, which overruled our previous decision in *In re Myers*, 119 Kan. 270, 237 Pac. 1026; however, he asks us to re-examine the *Breitenbach* decision and reinstate the rule in *In re Myers*. We will not restate the facts in the *Breitenbach* case, but it may be said that they are practically identical with the facts in the instant case, especially insofar as they affect the rules of law therein enunciated.

In the *Breitenbach* case we stated we had no quarrel with the holding that a discharge in bankruptcy is the equivalent of payment of the *civil liabilities* of all the bankrupt's provable debts (11 U.S.C.A. §35; G.S. 1949, 60-3601, -3602) and further stated:

> "The right to abate a criminal action afforded an offender under 21-556 is a right which he may or may not invoke. It is a privilege given by law to permit such an offender to correct an innocent mistake in issuing an insufficient fund check (*State* v. *Morris*, 190 Kan. 93, 372 P.2d 282). If the right is invoked, the offender must bring himself clearly within the terms of the statute, that is, he must show to the satisfaction of the court or judge that he has complied with the three statutory requirements: First, that he had an account in the bank 30 days next prior to the giving of the check; second, that the check was given without intent to defraud the party receiving it, and third, if the court shall so find, '*said action shall be abated and the defendant shall be discharged upon paying into court the amount of such check and the costs in said case*' (G.S. 1949, 21-556; *State* v. *Morris*, 190 Kan. 93, 372, P.2d 282).
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> ". . . The criminal prosecution is a matter in which the state alone is interested, and it is wholly unrelated to the proceedings in the bankruptcy court. It is elementary that there is a difference between a criminal action and a civil proceeding such as one in bankruptcy. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other (G.S. 1949, 60-109). The state is not here seeking to enforce the Coop's civil remedy. On the contrary, the defendant is seeking to abate the criminal action and obtain his discharge. That may be done only in the manner provided by the statute. While his discharge in bankruptcy is the equivalent of payment of his *civil liabil-*

> *ities* to his creditors, his payment of the check and costs to abate his *criminal liability* would not now constitute a preference of his creditors. Nor does the fact that the bankruptcy court made no determination that the debt represented by the check was not dischargeable under Sec. 17a(2) preclude the state from asserting that the defendant comply with the clear and unambiguous terms of the statute." (pp. 193, 194.)

The defendant contends that payment of the check under section 21-556, since the payment is not in the form of a fine or penalty, is in fact the payment of a civil obligation, and therefore a discharge in bankruptcy should abate the action under the said statute. However, the contention is not sound. As stated in the *Breitenbach* case, while the debt on the check is a *civil liability* and could be satisfied by a discharge in bankruptcy, the act of writing a worthless check creates a *criminal liability* and is not discharged by a proceeding in bankruptcy. Section 21-556 is merely a permissive statute under the criminal code that provides the offender with a method of discharging his criminal liability without subjecting himself to prosecution. This is a privilege of which the defendant may or may not avail himself.

In the *Breitenbach* case we construed section 21-556 and held that a discharge in bankruptcy may not be pleaded by an offender under the "worthless check" statute (G.S. 1949, 21-554) as payment of the check in a proceeding to abate the criminal action and obtain his discharge.

In the recent analogous case of *Kesler* v. *Dept. of Public Safety*, 369 U.S. 153, 7 L. Ed. 2d 641, 82 S. Ct. 807, involving the Motor Vehicle Safety Responsibility Act, which essentially provided that to avoid suspension of a driver's license the operator must show proof of his ability to respond in damages in the future and must satisfy any judg-

ment for any torts committed by him on the highway in the past, it was held that a discharge in bankruptcy relieves the bankrupt from legal liability to pay a debt that was provable, and is a valid defense in an action brought in the state court to recover the debt, but it does not free the bankrupt from all traces of the debt as though it had never been incurred. It was there stated that although states are not free to impose whatever sanctions they wish, other than an action of debt or assumpsit, to enforce collection of a discharged debt, the Bankruptcy Act does not forbid a state to attach any consequence whatsoever to a debt which has been discharged. The "worthless check" act leaves the bankrupt, to some extent, burdened by the discharged debt.

In *State* v. *Avery*, 111 Kan. 588, 207 Pac. 838, Justice Rousseau A. Burch, in speaking for this court, stated the purpose of the "worthless check" act was to discourage overdrafts and resulting bad banking, to stop the practice of "check kiting," and generally to avert the mischief to trade, commerce and banking which the circulation of worthless checks inflicts, thus establishing the public policy of this state, which, when exerted for the protection of the people of the state, is as pervasive as any of the reserved powers of the state and should be respected unless there is a clear collision with the national law which has the right of way under the Supremacy Clause of the federal Constitution.

It seems apparent that the intent of the legislature in enacting section 21-556, providing for the abatement of the offense upon meeting the requirements set forth therein, should serve as a substantial deterrent to prevent the fraudulent making and uttering of such checks thereby stopping the practice of "check kiting" and averting the mischief to trade, commerce and banking.

We are of the opinion the provisions of the mentioned "worthless check" act are not invalid under the Supremacy Clause of the federal Constitution as conflicting with the Bankruptcy Act, and what was said in *State* v. *Breitenbach*, supra, is controlling here and reaffirmed. It follows that the judgment of the trial court is affirmed.

It is so ordered.

PRICE, J., not participating.

SCHROEDER, J., dissenting: I cannot agree with the decision for the reasons stated in my dissent in *State* v. *Breitenbach*, 190 Kan. 189, 373 P.2d 601, at page 194 of the official reports.

No. 43,505

THE STATE OF KANSAS,
Appellee,

v.

ANTOINE BONTZ,
Appellant.

Syllabus by the Court

In an appeal from conviction and sentence under G.S. 1949, 21-554, known as the "worthless check" act, the judgment of the trial court is affirmed for the reasons set forth in the similar case of *State* v. *Bontz*, No. 43,504, ... Kan. ....., ... P.2d ....., this day decided.

Appeal from Sedgwick district court, division No. 2; HOWARD C. KLINE, judge. Opinion filed November 2, 1963. Judgment affirmed.

Ralph R. Brock, of Wichita, argued the cause, and *Lester L. Morris*, *Verne M. Laing*, *Ferd E. Evans, Jr.*, *Joseph W. Kennedy*, and *C. Robert Bell*, all of Wichita, were with him on the briefs for the appellant.

Owen J. Ballinger, deputy county attorney, argued the cause, and *William M. Ferguson*, attorney general, *Keith Sanborn*, county attorney, and *William J. Tomlinson*, deputy county attorney, were with him on the briefs for the appellee. The opinion of the court was delivered by

ROBB, J.: This is an appeal in a criminal proceeding wherein defendant was charged with violation of G.S. 1949, 21-554, known as the "worthless check" act.

In *State* v. *Bontz*, No. 43,504, ... Kan. ....., ... P.2d ....., this day decided, the same defendant was charged with the same crime although the payee of the check and the date and amount thereof are all different. However,

due to the similarity of the questions raised in the two cases, the rulings made in No. 43,504 are controlling here and they need not be repeated.

Judgment affirmed.

Price, J., not participating.

Journal Entry on Application to Abate

NOW, on this 17th day of December, 1962, and prior to the trial of this cause, this matter comes on for hearing upon the application to abate check pursuant to G.S. Kansas 1949, 21-556, filed by the defendant herein, the defendant, Antoine Bontz, appearing in person and by Morris, Laing, Evans & Brock, his attorneys, and the plaintiff, the State of Kansas, appearing by Owen Ballinger, Deputy County Attorney for Sedgwick County, Kansas, its attorney.

Thereupon, counsel for both parties stipulate in open Court that the hearing on the application to abate filed herein and the hearing on the application to abate and the amendment to such application filed by the defendant in Case No. [B-15200 or B-15201] before this Court, entitled the State of Kansas vs. Antoine Bontz, both involving checks dated May 18, 1961 and allegedly drawn by Bontz Construction Company, Inc., signed by the defendant as its President on the same drawee bank, may be consolidated; and the Court, being so advised by counsel, orders that the application to abate filed in each case be consolidated for hearing.

Thereupon, the defendant introduces his evidence in support of his application to abate filed in each of said cases, and rests, and the plaintiff introduces its evidence in opposition to abate, and rests; and thereupon the defend-

ant files in open Court a certified copy of Discharge of Bankrupt filed and entered on February 5, 1962 in the Matter of Bontz Construction Co., Inc., Bankrupt, in Bankruptcy No. 5882-B-2 in the United States District Court for the District of Kansas, and a certified copy of Discharge of Bankrupt filed and entered on February 5, 1962, in the Matter of Antoine N. Bontz III, Bankrupt, in Bankruptcy No. 5883-B-2 in the United States District Court for the District of Kansas, and moves that the defendant be discharged.

Thereupon, the Court, after hearing the evidence and arguments of counsel and being duly and fully advised in the premises, makes findings of fact and conclusions of law in the following language, to wit:

"1. That on May 18, 1961, defendant's exhibits 2 and 5, being the checks involved in these two cases, were issued by the defendant Bontz.

"2. That with reference to case B 15200, the check in the amount of $1232.91, was issued to James Ray Distributing Company in payment of the balance of account for the year 1960.

"3. That the check in B 15201 was issued to Dan Dragoo in the amount of $15,000.00 for payment of a note dated April 18, 1961 in the amount of $15,000.00 due May 22nd, 1961, the proceeds of which was received by the defendant Bontz in the amount of $15,000 and deposited in the Bontz Construction Company, Inc., account on April 18, 1961; that defendant's exhibit 5 was in payment of said note.

"4. That both checks, when presented to the bank were returned 'insufficient funds'.

"5. That the Bontz Construction Company, Inc., had an account in the East Side State Bank during the months of April and May, 1961, which was within 30 days prior to the giving of the checks.

"6. That at the time the checks were given in both cases, the defendant did not receive anything of value, and therefore, the Court finds that he did not have the intent to defraud the payees at the time the checks were issued. However, as I understand it, the defendant is not in a position to pay the $15 000 plus costs in B 15201 at this time. . . . Not including the discharge in bankruptcy. . . . With reference to B 15200, the defendant is not in a position to pay the sum of $1232.91 less the $750, plus the costs in cash or its equivalent other than the discharge in bankruptcy. . . .

"7. Prior to July 7, 1962 when the opinion in case of State of Kansas v. Breitenbach was filed, this court is of the opinion that the adjudication of bankruptcy of the Bontz Construction Company, Inc., and Antoine Bontz as an individual on or about July 25, 1961 and his and the corporation's discharge on or about February 5, 1962 would have, under the findings of this court been sufficient to abate these two criminal actions.

"However, as the Court reads the majority opinion in the case of State v. Breitenbach this Court is of the opinion that the adjudication and discharge in bankruptcy of the defendant Bontz and of the Bontz Construction Company, Inc., is no longer grounds for abatement and this, in and of itself, did not abate the action. . . ."

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED, ADJUDGED AND DECREED, that the application of the defendant to abate filed in the instant case and the application of the defendant to abate filed in Case No. B 15201 before this Court, and the motion of the defendant to be discharged, should be and hereby are denied.

Journal Entry on Trial

NOW on this 17th day of December, 1962, a regular judicial day of the September, 1962 Term of this Court, this cause comes on for arraignment and hearing as to the defendant Antoine Bontz; J. O. Ballinger, Deputy County Attorney, appearing for and on behalf of the State of Kansas, and the defendant, Antoine Bontz, appearing in person and by his attorney, Ralph R. Brock of Morris, Laing, Evans & Brock.

THEREUPON, the defendant waived arraignment and reading of the Information charging him with Violation of the Check Law, contrary to Section 21-554 of the 1949 General Statutes of Kansas.

WHEREUPON, the defendant entered a plea of not guilty and did then and there waive trial by jury and announce to the Court that he was ready for trial immediately. Whereupon, the State waived trial by jury and announced that it was ready for trial immediately.

THEREUPON, the State made an opening statement and proceeded to present evidence and rested.

THEREAFTER, the defendant by and through his attorney makes oral application for an order discharging the defendant for the reason that the State had failed to prove a cause of action.

THEREUPON, the Court, having heard the arguments of counsel and being duly advised in the premises and having examined the file, overruled the defendant's motion for a discharge.

WHEREUPON, the defendant elected to present no evidence and rested.

WHEREUPON, the Court heard statements of counsel, examined the files herein and after having heard the evidence presented by the State found the defendant guilty of Violation of the Check Law, Section 21-554 of the 1949 General Statutes of Kansas.

WHEREUPON, the defendant by and through his attorney, orally moved the Court for an order granting the defendant time to file a Motion for New Trial and an order setting the motion for hearing.

THEREUPON, the Court granted the defendant five (5) days to file a Motion for New Trial and set the Motion for hearing on the 11th day of January, 1963 at 10:00 a.m. in this Court.

APPENDIX "B".

G.S. Kan. 1949, 21-554. Giving worthless check or draft. It shall be unlawful for any person, corporation, or partnership, to draw, make, utter, issue or deliver to another any check or draft on any bank or depository for the payment of money or its equivalent, knowing, at the time of the making, drawing, uttering or delivery of any such check or draft as aforesaid that he has no funds on deposit in or credits with such bank or depository with which to pay such check or draft upon presentation.

G.S. Kan. 1949, 21-556. Action abated upon proper showing and payment of check and costs. That in any case where a prosecution is begun under this act, the defendant shall have a right, upon application made for that purpose before trial, to have said action abated by showing to the court or judge that he has had an account in said bank upon which said check or draft was drawn, thirty days next prior to the time said check or draft was delivered and that said check or draft was drawn upon said bank without intent to defraud the party receiving the same, and if the court shall so find, said action shall be abated and the defendant shall be discharged upon paying into court the amount of such check and the costs in said case.

G.S. Kan. 1949, 21-557. Credits defined. The word "credits" as used herein shall be construed to be an arrangement or understanding with the bank or depository for the payment of such check or draft.

G.S. Kan. 1949, 21-558. Act not applicable where check honored by bank. It is further provided that nothing in this act shall apply in cases where checks or drafts were

actually honored by bank or banks on which they were drawn.

G.S. Kan. 1949, 21-559. **Construction of act.** That nothing in this act shall be construed as repealing sections 94 [21-551], 95 [21-552] and 96 [21-553] of chapter 31, General Statutes of 1868, or any existing law or laws now in force.

G.S. Kan., 1961 Supp., 21-555. Penalties for violating G.S. 1949, 21-554; misdemeanor or felony. That any person, corporation or partnership, willfully violating any of the provisions of section 21-554 of the General Statutes of 1949 or acts amendatory thereof, shall be deemed guilty of a misdemeanor if such check or draft is drawn for less than fifty dollars ($50) and upon conviction shall be punished by a fine of not less than twenty-five dollars ($25) and not more than one hundred dollars ($100) or imprisonment in the county jail for a period of not less than ten (10) days and not more than six (6) months, or by both such fine and imprisonment. If said check or draft shall be drawn for an amount of fifty dollars ($50) or more, such person shall be deemed guilty of a felony and upon conviction shall be punished by a fine of not less than one hundred dollars ($100) and not more than five thousand dollars ($5,000), or by imprisonment in the state penitentiary for a period of not less than one (1) year nor more than five (5) years, or by both fine and imprisonment.